Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 57.

STORY PARCHMENT COMPANY,

PETITIONER,

v.

THE PATERSON PARCHMENT PAPER COMPANY AND KALAMAZOO VEGETABLE PARCHMENT COMPANY.

BRIEF FOR THE PETITIONER.

OPINION OF THE COURT BELOW.

The opinions in the Circuit Court of Appeals for the First Circuit are reported in *Paterson Parchment Paper Co.* v. *Story Parchment Co.*, 37 Fed. (2d) 537. The majority opinion of Judge Wilson and the dissenting opinion of Judge Anderson may be found at pages 613 and 621 of the record, respectively.

JURISDICTION.

The case is before the Court upon a writ of certiorari granted on April 14, 1930, under the authority of section 240 (*a*), Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

a. The Judgment to be Reviewed.

The petitioner was the plaintiff and the respondents were defendants in an action under the Anti-Trust laws of the United States in the District Court of the United States for the District of Massachusetts, in which the jury returned a verdict for the plaintiff in the sum of sixty-five thousand dollars. The verdict was, however, in form an alternative one, being for the defendant "if, as a matter of law, the plaintiff is not entitled to a verdict" (R. 13). Judgment was entered thereon for the plaintiff for threefold the damages, and costs.

On January 23, 1930, the Circuit Court of Appeals for the First Circuit ordered that the judgment of the District Court be vacated, and the case remanded with directions to enter judgment for the defendants, with costs in both Courts.

The Court of Appeals unanimously agreed that there was evidence of a conspiracy to maintain a monopoly and of concerted action to fix prices, in which the defendants participated. The majority, however, held—Judge Anderson dissenting—that the plaintiff was not entitled to recover, because the evidence failed to show that the conspiracy resulted in damage to the plaintiff to any measurable extent or degree.

b. Outline of the Main Events.

The plaintiff was a corporation organized in 1927 to manufacture and sell vegetable parchment, a paper principally used as a protective wrapper for food-stuffs. It carried on business from November, 1927, until June, 1928.

For many years prior to the organization of the plaintiff the defendants and the West Carrollton Parchment Company (not joined as a party to the suit, for lack of jurisdic-

tion) had been the only producers of vegetable parchment in this country, and had combined to restrict competition and to maintain uniform prices for their product, so that they enjoyed a practical monopoly of trade and commerce in vegetable parchment among the United States.

The entry of the plaintiff into competition in that commodity threatened to terminate that monopoly.

The defendants and West Carrollton Parchment Company thereupon conspired to maintain their monopoly, and to prevent the plaintiff from acquiring any part of the trade and commerce in vegetable parchment. Pursuant to the conspiracy and as one means of accomplishing its purpose, they initiated and carried on a price war against the plaintiff, in which, acting in concert, they simultaneously reduced their prices from time to time to figures which were not only below fair and reasonable prices, but even below cost for their product.

The conspiracy was successful, and the plaintiff was compelled, as a result of the conditions in the trade which the combination had created, to cease carrying on business.

c. The Concerted Reductions in Prices.

The reductions in prices made by the defendants and West Carrollton in combination were as follows:

1. ½ cent per pound reduction in the prices of all parchment in rolls, about December 5, 1927 (K-153, R. 161; P-328, P-130, R. 164; R. 527; R. 509; R. 539).

2. 1 cent per pound reduction in the basic price, effective on all parchment on January 2, 1928 (R. 197-200; P-11*a*, P-12, P-13, K-359, K-360, W-109).

3. 2½ per cent trade discount given to the meat packers, on February 10, 1928 (R. 541; R. 280; R. 491).

4. 5 per cent trade discount given to the meat packers, on February 29, 1928 (R. 499; R. 515; R. 526; R. 535; R. 538; P-333; R. 339; P-325, R. 337).

5. 1 cent per pound reduction in the basic price and new discounts on circles, effective on all parchment, on March 9, 1928 (W-111, R. 359; P-6 and P-8, R. 360; R. 479; R. 536; R. 542).

6. 33⅓ per cent reduction in printing prices for sizes up to and including 63 square inches, made on May 14, 1928 (R. 481; R. 534; R. 544; R. 480; P-10, R. 471; K-331, R. 472; R. 558).

d. The Damage to the Plaintiff.

In the first place, during the period in which the plaintiff was engaged in trade and made sales of its products it was compelled, in order to carry on business, to sell at the reduced prices which the combination had fixed. Its revenue was thereby diminished below the amount which it would have received for its products at fair and reasonable prices.

There was in evidence a schedule of all sales by the plaintiff to customers upon which deliveries were made after January 2, 1928, specifying as to each sale the quantity and quality of the goods, the actual price per pound or per given quantity, the discount, and the actual amount of the invoice (Exhibits S-11 and S-12, not printed, but transmitted as a part of the bill of exceptions, R. 593).

There was evidence from which the jury could determine what would have been fair and reasonable prices. Price lists effective during the two years prior to the price war were introduced (Exhibits P-424, K-354, W-106, not printed, but transmitted as part of the bill of exceptions, R. 471-472).

Cashmore, treasurer and sales manager of the defendant Paterson Company, testified with references to these prices before any reduction:

> "It did not occur to him that present prices were too high and giving him an unreasonable profit. He thought the profits were reasonable and proper and not exces-

sive. He didn't know of any increase in costs of production—or decrease. He would not want to say that a reduction of one cent would cut profits in two. It was quite a substantial reduction, and was bound to affect substantially their profits which at the time he believed were none too large. A reduction of two cents would still more seriously affect the volume of their profits . . . He didn't know when they made the second reduction whether it would entirely wipe out his profits. He knew it would reduce them to a narrow margin—narrower than he felt they ought to be in fairness to its company and its stockholders" (R. 508).

The defendants' correspondence put in evidence contained frequent admissions of the fact that their costs of production exceeded the prices at which they were selling. For instance, Kindleberger, president of the Kalamazoo Company, wrote to Moyer, manager of West Carrollton, shortly after the reduction of January 2d:

> "I don't believe we should be too hasty to meet every new price that we hear about or the first thing we know we will be all beating our way to the poorhouse. Prices on Parchment now, as I figure it, are bottom rock. It is going to mean strict economy saving every penny in order to keep our heads above water" (R. 186; R. 235).

See also R. 209, 233, 234, 246, 248, 249, 258, 341, 353, 354, 361, 362, 372, 377, 398, 399, 444, 446, 447, 482, 561.

There was detailed evidence as to the plaintiff's costs of production (R. 584-585) and as to Paterson's (Exhibits P-31 to P-50, not printed, but transmitted as part of the bill of exceptions). The correspondence forming so large a part of the bill of exceptions (R. 19-470) is replete with reports upon the market for parchment during the period of plaintiff's competition. There is direct testimony on cross-ex-

amination of the plaintiff's treasurer that the November, 1927, prices less a discount of 5 per cent were fair (R. 582).

Secondly, when the plaintiff was forced to retire from business it had on its hands a plant which it had acquired and equipped for the manufacture of vegetable parchment. Much of its equipment was of no value for any other purpose. By reason of the existence of defendants' monopoly and the general knowledge in the trade of its effect upon the plaintiff's business, the sale of the plant as a going concern became impracticable. Its value disassembled was much less. The value of the plaintiff's plant was thereby depreciated.

There was evidence of the cost of assembling the plant and equipment (R. 562-563). There was the evidence, already mentioned, of the cost of operating the plant, and of prices for its products under normal conditions and those actually created, and by reference thereto of its probable earning capacity under those different conditions. There was evidence that the quality of its product was excellent (R. 591); that those who bought it thought it so (R. 260, 274, 276-278, 288, 352); and that its parchmentizing machine was larger and more efficient than those of the other companies (R. 591-592). There was direct testimony that the value of the plant in June, 1928, under the conditions shown by the evidence, was $75,000 (R. 564), as compared with its cost of about $235,000 (R. 562-563).

In the District Court the plaintiff claimed that it had been damaged by the defendants' wrongful conduct, both in its property and in its business; in its property, in that it had been compelled to sell its product at the unreasonable prices fixed by the combination, and in that it had been prevented from making that use of its plant and equipment for which it had been designed and which as a result was depreciated in value; and in its business, in that it had been prevented from acquiring trade in parchment at fair and reasonable prices yielding a profit, as it would otherwise

have done. The District Court, however, instructed the jury that "in this case nothing should be allowed for profits on the sales which might have been made if there had been no unlawful interference with the plaintiff's business, because we have here no history of the operations of the company, no facts upon which you could base an estimate of what these profits might have been" (R. 600). The case, therefore, went to the jury solely on the two items of damage to the plaintiff's property referred to above.

e. The Grounds of the Judgment Below.

The decision of the Circuit Court of Appeals concedes that these items of damage, *i.e.*, the diminution in revenue and in the value of the plant, are recoverable, if shown to have been caused to any measurable extent or degree by wrongful conduct of the defendants. The opinion of the majority, however, is that, though the facts hereinabove summarized were shown, the plaintiff nevertheless failed in its proof.

Diminution in revenue. With reference to the plaintiff's contention that it was entitled to recover the difference between the amounts for which it sold its products and those which it would have realized at fair and reasonable prices, there being evidence that the prices current in November, 1927, were fair and reasonable, the majority say:

> "The error in the plaintiff's contention is the assumption that, but for the alleged unlawful conspiracy of the defendants with the Carrollton Company, the prices current in November, 1927, would have continued to prevail, assuming them to be fair and reasonable . . .
>
> "Individuals may in competition lawfully reduce prices below a fair and reasonable level . . .
>
> ". . . free competition between individuals to gain trade may always reduce or keep prices below what is fair and reasonable . . ." (R. 618).

". . . it is, we think, a moral certainty that, according to Nature's first law, each of the three old companies, if no combination had existed, in order to hold their trade would at least have met every reduction in price made by the plaintiff to gain trade, if they did not openly reduce their prices below the prices fixed by the plaintiff, as independently they lawfully could do. That the defendants would, independently of each other, act upon this rule of self-preservation, is not mere conjecture, but a rule of action of which the courts often take cognizance" (R. 619).

". . . the plaintiff, even if there had been no unlawful combination by the defendants, did not have a broad, open market in which to dispose of its product. Without any such unlawful interference, it would have been compelled to dispose of its product in the same restricted market,* which the old companies were already fully supplying, and to meet any prices the old companies individually saw fit to make. Nothing could be more certain than that each of the old companies would in any event use every lawful means to retain their own trade as against the new competitor; and nothing more conjectural than the result" (R. 619).

Their conclusion was that—

"The plaintiff has not, therefore, sustained the burden of proving that it has suffered any measurable damage from the reduced prices at which it was compelled to sell its product by reason of the alleged unlawful conspiracy of the defendants . . ." (R. 620).

*The Court clearly cannot have meant, by the words "restricted market," that the number of buyers in the market for parchment was limited. The wide demand for the commodity was undisputed. *E.g.*, Kindleberger, president of the defendant Kalamazoo Vegetable Parchment Company, testified: "Their customers are all over the United States and a little abroad, including the dairy industry, meat packers, ice cream manufacturers, celery washers, poultry packers, retail groceries and meat markets, preserving manufacturers, soap manufacturers and other minor industries" (R. 518).

Where the opinion refers to the "assumption" by the plaintiff that, but for the conspiracy, the prices current in November, 1927, would have continued to prevail, it is clear that the assumption intended to be described is only one that there was evidence for the jury of the facts contained therein, for the question was submitted to the jury under appropriate instructions:

> ". . . if you are satisfied that this price would have been maintained, would not have changed by reason of any economic condition, if it would have been maintained except for the unlawful acts of the defendants, if you find they did commit unlawful acts . . ." (R. 601).

Indeed, the majority manifestly thought, not only that the jury could not have found that the prices current in November, 1927, or fair and reasonable prices, would have prevailed during the period of the plaintiff's competition, but that it was "a moral certainty," "according to Nature's first law." that the defendants and West Carrollton Parchment Company, in the absence of a conspiracy, would have made substantially identical reductions in price, independently, and therefore lawfully.

Upon this view of the facts the majority of the Court conclude that the plaintiff could have suffered no measurable damage, since, *as they assume*, no damage is caused by acts pursuant to an unlawful conspiracy where the same damage would otherwise have been caused by the same acts independently and therefore lawfully done.

Depreciation in value of the plant and equipment. The opinion of the Circuit Court of Appeals concedes that there was evidence of a depreciation in value of the plaintiff's plant and equipment, and that, if that depreciation were caused by unlawful acts of the conspirators, the defendants would be liable for that damage. But the majority assert that the failure of the plaintiff's business and the subse-

quent depreciation in value of its plant was not caused by the conspirators, but was "inevitable either from lack of capital or inefficient management, or both."*

Here again the decision assumes the "moral certainty" that conditions in the trade would not have been substantially different had there been no conspiracy, and that the defendants are therefore not responsible for the actual conditions which, admittedly, they conspired to bring about for the purpose of destroying the plaintiff's competition.

Specification of Errors.

We understand that we have the right to discuss, and intend to urge, only those errors of the Circuit Court of Appeals made the basis of the petition for certiorari. We shall not here attempt to meet the argument—not accepted by any of the judges below, but repeated in the defendants' brief in opposition to the petition for certiorari, and perhaps again to be renewed—that there was no evidence of an unlawful combination by the defendants directed against the plaintiff. It seems to us indeed doubtful whether this Court has power to review the decision that there was such evidence without the allowance of a cross-writ of certiorari. While this Court may, of course, affirm the judgment of the Circuit Court of Appeals, though rejecting the reasons there offered, and for other reasons, the decision reached by both

*The majority opinion refers to certain figures in evidence, and from these concludes: "Unless its stock on hand of about $8,000, and its bills receivable largely exceeded its bills payable, other than those above mentioned, which is not a reasonable inference from the testimony, its assets in eight months of operation had shrunk more than $100,000." (R. 620). The balance sheets themselves were not in evidence, and it did not occur to the Court that cash in hand and in banks, supplies, and inventories, other than finished inventory, reserves, and prepaid expenses, would affect this calculation. Moreover, the figure of about $8000 for stock on hand was as of the last of October, 1928 (R. 577), four months after the company had ceased to manufacture and to incur any substantial expense, and the Court did not know the amount of the bills receivable. The Court could not know that they did not largely exceed the bills payable other than those mentioned, as in fact they did.

Courts below, that is, that there was evidence that the plaintiff had been wronged, is logically distinct and divisible from a decision that there was nevertheless no damage to the plaintiff. We do not believe that the Court may consider whether to reverse such a divisible part of a judgment, from which no appeal has been taken, in order to affirm the whole.

> See *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52, 66.
> *Montana Mining Co.* v. *St. Louis Mining & Milling Co.*, 186 U.S. 24.

But whatever the power of the Court, we assume that, since the writ is granted only "in cases involving principles the settlement of which is of importance to the public," and not to review evidence, the Court will not review evidence merely because the respondents desire such a review, and in any event only after calling upon the petitioner to submit argument.

Accordingly we specify as the errors of the Circuit Court of Appeals intended to be urged those alleged as the reasons relied on for the allowance of the writ, namely, that—

1. The decision is that one injured by reason of a conspiracy in violation of the Anti-Trust laws cannot recover the damages caused by acts in combination pursuant to such conspiracy if such acts, without combination and in the absence of conspiracy, would have been lawful and might or would naturally have been done.

2. The decision is that, in order to measure the damages caused by acts done in combination pursuant to such a conspiracy, there must be subtracted from all the damage caused such damage as might have lawfully been caused by similar acts not in combination, in the absence of a conspiracy, and in fair competition.

3. The decision is that there can be as matter of law no causal connection between a conspiracy and acts pursuant

thereto to accomplish the plaintiff's failure, and the accomplishment of that purpose, on the ground that, in the absence of a conspiracy, by reason of similar acts lawfully done, the plaintiff would have failed.

4. The decision assumes that in the absence of a common understanding and purpose the defendants would have created conditions in trade and commerce in parchment substantially identical in effect with those which were actually caused pursuant to conspiracy—a conclusion which could not have been drawn from the evidence, which was not accepted by the jury, and which disregards the very considerations of policy which were the source of the provisions of the Anti-Trust laws against combinations.

5. The decision constitutes a reversal for error in fact.

6. The decision denies to a person injured by reason of a violation of the Anti-Trust laws the right to recover even nominal damages and its costs.

7. The decision was that judgment should be entered for the defendants below, instead of directing that a new trial should be had.

Argument.

Summary of Argument.

1. Damage may be caused by acts pursuant to an unlawful conspiracy, even though the consequences of such acts are no different from those which might or would have occurred in the absence of a conspiracy.

2. The Court below had no right to assume as a matter of judicial knowledge that, in the absence of a conspiracy, conditions in the trade would have been substantially similar to those actually created by the conspirators.

3. The evidence was sufficient to enable the jury to ascertain the amount of the plaintiff's damages with reasonable certainty.

4. The plaintiff was at least entitled to recover nominal damages and its costs.

5. The Circuit Court of Appeals had no power to order judgment for the defendants below.

Point I. Damage may be caused by acts pursuant to an unlawful conspiracy, even though the consequences of such acts are no different from those which might or would have occurred in the absence of a conspiracy.

The question which, in the opinion rendered by the majority of the Court below, is said to be decisive of this case is whether there was evidence that any damage, or any measurable damage, was caused to the plaintiff by what was done by the defendants.

It must be clear, however, that the Court regarded this question as one quite different in substance from the question whether what was done by the defendants had any effect, adverse or otherwise, upon the plaintiff. There is, and could have been, no doubt that the plaintiff was hurt by what was done.

The real question, therefore, which the Court decided was whether the plain consequences of what was done by the defendants to the plaintiff were *damage* to it.

The problem must have appeared to the Court somewhat in this form:

What damage results from acts lawful in themselves, but made unlawful because of their purpose?

The majority answered this question by saying that only such consequences to the plaintiff as would not have resulted except for the existence of the wrongful purpose are damage.

When it then occurred to them that, but for the existence of the purpose, there would have been no combination, nor the added power which a combination is supposed to have, they disposed of that suggestion by saying that they could

see that in the particular situation presented the existence of a combination made no difference; the things done would have been done anyway, in the absence of an unlawful purpose, or at least such substantially similar things would have been done as to make the difference between what was done and what would have been done (the damage, in their view) conjectural.

Now the plaintiff had claimed that the defendants and West Carrollton Parchment Company had by concerted price reductions created an artificial level of prices below fair and reasonable prices, that is, below such prices as would have been fixed by the play of varying supply and demand in the absence of manipulation, and below cost, and that it had been compelled to sell at the reduced prices; that thereby its revenue had been diminished; that by this means and by the concerted efforts of the conspirators to prevent it from acquiring any part of the trade in parchment it had been compelled to discontinue business and the value of its property had been depreciated.

Grant that,—say in effect the majority,—for there was evidence of it; but how has the plaintiff been damaged by the conspiracy? All that has happened might have happened in the absence of a conspiracy, and we can see that it would have happened.

Is the position of the Court sound or does it accord with established principles? We believe that it is clearly erroneous.

Damage is caused by overt acts, not by purpose or intention, or common purpose or conspiracy. A mere conspiracy without acts following it can damage no one. Though the public may complain in criminal proceedings, such a conspiracy affords no one a civil remedy.

But acts which cause damage may be lawful, and therefore form no basis for a recovery. Damage so caused is known as *damnum absque injuria*.

It has always been recognized that the effect of the competition of one person upon another's business may be damage, though it is *damnum absque injuria.*

Year Books, 11 H. 4, 47:

"Dammum puit estre absque injuria, come si j'ay un Molyn, et mon vicine leve un auter Molyn, peront le profite de mon Molyn est diminish, j'aver nul action vs. luy, uncor il est damage a moy."

Keeble v. *Hickeringill*, 11 Mod. 131:

Holt, C.J.: "It is true, there may be a dammum sine injuria. If a man set up the same trade as mine in the same town, this is a damage to me, but it is sine injuria; for it is lawful for him to set up the same trade if he please."

Mogul Steamship Co. v. *McGregor*, 23 Q.B.D. 598, 613:

"The acts of the defendants which are complained of here [price reductions], were intentional, and were also calculated, no doubt to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse."

Commonwealth v. *Hunt*, 4 Metc. 111, 134:

"Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell

his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved, that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition, that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strives to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

"We think, therefore, that associations may be entered into, the object of which is to adopt measures that have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment."

Vegelahn v. *Guntner*, 167 Mass. 92, 106:

". . . it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. In such a case he is not held to act 'unlawfully and without justifiable cause,' as was alleged in *Walker* v. *Cronin* and *Rice* v. *Albee*. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society

than it costs, and that on this ground the infliction of the damage is privileged."

Indeed, at common law it was lawful for persons to combine or conspire to restrain the competition of another, and thereby to cause him damage.

Mogul Steamship Co. v. *McGregor, supra.*
Vegelahn v. *Guntner, supra.*

But Congress by the Sherman Act made every combination or conspiracy in restraint of trade or commerce among the several states illegal. Any acts pursuant to such a combination or conspiracy became themselves unlawful by force of the statute, no matter how innocent they might be when done by one.

Swift & Co. v. *United States,* 196 U.S. 375, 396:

"It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

Aikens v. *Wisconsin,* 195 U.S. 194, 206:

"The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law;" quoted in—

Loewe v. *Lawlor,* 208 U.S. 274, 299.

When, by statute, acts otherwise lawful are made unlawful because done pursuant to a prohibited conspiracy, no change in the actual consequences of the acts is produced. The acts still cause the same results, the same damage. What the statute does is to remove the privilege under

which they were formerly shielded. It should follow that what was *damnum absque injuria* is now recoverable damage.

The decision of the Circuit Court of Appeals leads to this curious construction of the statute, that that which at common law caused only *damnum absque injuria* becomes, when prohibited by statute, *injuria sine damno.*

Of course it is not claimed that all losses suffered by the plaintiff are damage recoverable from the defendants. They are undoubtedly not responsible for conditions created by the plaintiff itself or by others. Nor should they be responsible for the consequences of their acts, otherwise lawful, and not within the scope of the conspiracy and pursuant to it.

It is perceived that the entry of the plaintiff into competition with the established companies might have disturbed the existing equilibrium of supply and demand. If the introduction of its production to the market had the effect of reducing prices below fair and reasonable prices, or below a price at which it could sell at a reasonable profit, it would itself be the cause of any damage suffered and not the defendant. In fact, however, it is obvious that the plaintiff's production could have had little effect upon the market when its total production from November, 1927, to October, 1928, 1,733,682 pounds (R. 577), is compared with the total gross production of the other three companies, 38,000,000 pounds (R. 566, 473, 518, 538).

In any event, it was for the jury, having before it evidence of the prices for parchment prevailing over a number of years, of costs of production, of the quantities produced and sold, of the nature and extent of the demand for the product, and the statements of witnesses as to their opinion of what was a fair price, to determine what would be a fair price for the product under natural conditions, and to what extent the acts of the defendants pursuant to the conspiracy had reduced the actual price below a fair price. It was no

more difficult for them to do so in this case than in those cases where a combination has increased the market price above a "fair price . . . under natural conditions," and a purchaser at that price has been allowed to recover the overcharge.

Chattanooga Foundry & Pipe Works v. *Atlanta*, 203 U.S. 390, 396.

Thomsen v. *Cayser*, 243 U.S. 66, 68.

Straus v. *Victor Talking Machine Co.*, 297 Fed. 791, 803.

It was for the jury as well to determine whether the conditions existing in the trade which indisputably resulted in the failure of the plaintiff's business and the subsequent depreciation of its plant were "natural conditions," or were conditions intentionally created by the defendants and West Carrollton Parchment Company in order to destroy the plaintiff. Nor were they bound to assume, as the majority of the Court of Appeals did, that, if it were certain that in the absence of a conspiracy similar conditions would have prevailed, the actual conditions were "natural conditions," for which the defendants would be in no wise responsible. It cannot be a defense that conditions causing damage to the plaintiff might have been created under the cloak of the privilege of fair competition, if in fact they were not.

Point II. The Court below had no right to assume as a matter of judicial knowledge that, in the absence of a conspiracy, conditions in the trade would have been substantially similar to those actually created by the conspirators.

We have, under the heading next preceding the above, dealt with the case upon the assumption which we believe that the majority of the Court below made, that in the absence of a conspiracy conditions in the trade would have

been substantially similar to those actually created by the conspirators—and pointed out our reasons for believing that, were it justified, it fails to support the decision.

We ought to point out that the opinion does not state the assumption quite as shortly and plainly as we have done; it is cast in a negative rather than a positive form. The opinion states (R. 619):

> ". . . there is no ground on which it can be reasonably inferred that . . . any prices above those actually received, would have prevailed. On the contrary, it is, we think, a moral certainty, that, according to Nature's first law, each of the three old companies, if no combination had existed, in order to hold their trade would at least have met every reduction in price made by the plaintiff to gain trade if they did not openly reduce their prices below the prices fixed by the plaintiff, as independently they lawfully could do. That the defendants would, independently of each other, act upon this rule of self preservation, is not mere conjecture, but a rule of action of which the courts often take cognizance."

In a few words, the position of the majority was that there was no evidence that anything that happened would not have happened anyway.

We think, however, that the jury were justified in believing that, but for the combination, conditions in the trade would have been quite different. It is natural that each company in business should endeavor to obtain as large a share of the trade as possible at a fair price yielding a reasonable profit. It is not to be expected, on the other hand, that a company will manufacture goods to sell them at a loss. It does not seem to us proper even to guess, much less to assume, as the majority of the Court below do, that each company, acting independently, would have been so

moved by a desire to eradicate the competition of the new company as to precipitate a price war in which prices would be reduced below cost, or even to a point where no profit could be made. It is to be remembered that the jury were clearly warranted in finding that the reductions in prices actually made by the defendants were below their cost. See the statements in their correspondence (*e.g.*, R. 482, 235, 233, 234, 246, 248, 249, 258, 341, 398, 399, 372, 209, 361, 362, 377, 353, 354, 444, 446, 447).

The jury might well have considered that, had the established companies been acting independently, there was no more reason for each to engage in cut-throat competition with the plaintiff than with any of the others, and that, since no disposition to do so had been manifested prior to the plaintiff's entry into the field, the fact that a new company had undertaken to compete on a comparatively small scale furnished no occasion for a change in policy by each.

Moreover, the opinion fails to recognize the truth, so generally acknowledged, that there is in a combination a power of coercion which does not exist in the individual members thereof.

> *Pickett* v. *Walsh*, 192 Mass. 572, 582.
> *Martell* v. *White*, 185 Mass. 255, 259, 260.
> *Mogul Steamship Co.* v. *McGregor, supra*, 616.

It may be suggested that the fact that there was a combination against the plaintiff shows that the defendants, in this very case, recognized that they might thereby gain a power which they lacked standing alone. What inner necessity compelled them, otherwise, to meet and to agree that their reductions in price should be concerted?

The Anti-Trust laws themselves show that Congress perceived that there was a danger in combinations which did not exist where competitors acted independently. We do not believe that a Court has the right to deny effect to the stat-

ute by saying that in a particular case Congress was mistaken and that what the combination did in the case before it was nothing more than would have been done without understanding or preconcerted plan; certainly a Court should not do so without evidence and merely as a matter of judicial knowledge.

Nor does the fact that the established companies might, conceivably at least, have done independently what they did in concert make the plaintiff's damages conjectural. Damages do not become conjectural because it may be conjectured that they might have been caused in some other and lawful way.

For an able criticism of the conclusion of the majority on this point we refer to the dissenting opinion of Judge Anderson. We quote from it the following:

> "The conclusion is (to repeat) that, without the defendants' conspiracy to put the plaintiff out of business, it would have died anyway. The logic is, in that regard, hardly distinguishable from setting up the mortality of all human beings as a defense to an indictment for manslaughter or murder. The undeniable facts are that the defendants conspired to kill the plaintiff and the plaintiff died. The majority opinion is to the effect that the conspiracy was unnecessary; that the plaintiff would have died anyway. I do not assent to such reasoning or its results" (R. 626).

Point III. The evidence was sufficient to enable the jury to ascertain the amount of the plaintiff's damages with reasonable certainty.

The misconception entertained below, that is, the view that the damages caused by an unlawful conspiracy are only those consequences which could not have resulted had the several conspirators acted independently, appeared nat-

urally to absolve the Court from the necessity of considering in any detail the evidence as to the extent of the total consequences of the defendants' unlawful acts.

It is clear that the total consequences of those acts (in our view, the damages) were shown by the evidence with sufficient certainty to enable the jury to measure the compensation to be made therefor.

Of course, "it is sufficient if a reasonable basis of computation is afforded, although the result be only approximate . . . Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."

> *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379.

We have already pointed out that the plaintiff was compelled to sell its product at reduced prices, and that it was for the jury to determine whether those prices were below "the market or fair price . . . under natural conditions had the combination been out of the way" (*Chattanooga Foundry* v. *Atlanta, supra*).

The jury were appraised of all sales by the plaintiff at the reduced prices, having before them a schedule furnishing full information as to all such sales (Exhibits S-11 and S-12, not printed, but transmitted as part of the bill of exceptions, R. 593). They were, of course, not bound to find that they were at less than fair prices, or that the November, 1927, prices were fair prices. But having determined what was a fair price, they could determine precisely how much less the plaintiff actually received, and in what amount the plaintiff's revenue was diminished.

If November, 1927, prices were accepted as the fair prices, a computation of the loss to the plaintiff might be made directly from a reference to the price lists in evidence. All

the prices in the price lists were ratably proportioned to the basic prices. If another basic price than that of November, 1927, were taken as the fair price, a calculation might, therefore, be made, based upon the price lists, but reduced or increased ratably as the basic price had been modified.

The defendants, however, may suggest that there is doubt whether, had there been no combination, the plaintiff could have made the same sales which it made at the reduced prices, and that there is therefore an element of speculation which should not have been left to the jury.

The suggestion results from a failure to comprehend the concept of a "fair and reasonable price." Of course, the plaintiff cannot prove, in the very nature of things, that, at "fair and reasonable prices," it would have made the identical sales which it made at the reduced prices. But "fair and reasonable prices" are by definition prices at which a seller willing to sell can dispose of his goods on the market. If the plaintiff could have disposed of its product at fair and reasonable prices but for the defendants' wrongful acts, it makes no difference in its damages that the sales might have been to other persons in other quantities than those actually made.

The truth is that, if there was any element of speculation left to the jury, it was because the question what would have been "the market or fair price . . . under natural conditions had the combination been out of the way," and which was left to them, is one which must always contain some elements of uncertainty and upon which experts might well disagree. But that question, it is settled, was for the jury, and is only one of a great many of that class which are habitually decided by juries.

Straus v. *Victor Talking Machine Co., supra,* 802:

> "The constant tendency of the courts is to find some ways in which damages can be awarded where a wrong

has been done. Difficulty of ascertainment is no longer confused with the right of recovery."

Linen Thread Co. v. *Shaw*, 9 Fed. (2d) 17, 19:

"The rule that damages, if uncertain, cannot be recovered, applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent a recovery."

Moreover, the sales actually made by the plaintiff, while not conclusive, were, of course, some evidence as to the amount of sales which it might have made under normal conditions. Evidence of sales made in prior years is constantly received by the Courts to show what sales might have been made in later years. It is assumed that conditions in later years might change. The evidence is nevertheless received, though the weight to be given it may depend upon the similarity of conditions in the years to be compared. Such evidence was held to be competent and material in *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra.* In this case evidence of sales in the same year under adverse conditions is certainly competent to show that under more favorable conditions sales to at least that extent might have been made.

Again it was clear that the unlawful activities of the defendants had caused a depreciation in value of the plaintiff's plant and equipment.

Such "going value" as the plant and equipment had was obviously destroyed. "Going value" may, of course, be one element of damages.

Des Moines Gas Co. v. *Des Moines*, 238 U.S. 153, 165:

"That there is an element of value in an assembled and established plant, doing business and earning

money, over one not thus advanced, is self evident. This element of value is a property right, . . . ;" quoted in—

McCardle v. *Indianapolis Water Co.*, 272 U.S. 400, 414.

But loss of "going value" does not fully measure the depreciation in value to the plaintiff's plant caused by the defendants' acts.

The existence of the combination by the defendants and West Carrollton and the activities which it directed against the plaintiff might have been found to have deprived the plaintiff of that use of its plant for which it was designed and for which its equipment might most effectively be employed. The history of those activities and their consequences to the plaintiff would practically discourage others from attempting to make the same use. What had occurred to the plaintiff was forceful though constructive notice to any persons who might be interested in purchasing the plaintiff's plant and equipment, even though not operating or disassembled, that they could not be used to manufacture parchment.

We take, as an example, the effect of the existence and activities of the combination upon the parchmentizing machine owned by the plaintiff. The machine cost the plaintiff $78,800. It was installed at an approximate cost of $20,000 (R. 563). Whether or not its cost represented its fair market value, its assembly in a plant with other equipment designed for the purpose of manufacturing parchment may have added an element of "going" value to the plant. Now, if the wrongful acts of the defendants have not only closed the plant, but made it impracticable to attempt to use that parchmentizing machine in any other plant, what value has the machine? Obviously, unless it can be used in parchmentizing, its value is purely that of junk.

There was evidence from which the jury might estimate the amount of the depreciation in value of the plaintiff's plant resulting from the defendants' acts.

There was evidence of the actual cost of the plant in 1927. This was some evidence of its value under the conditions then existing.

McCardle v. *Indianapolis Water Co., supra.*

Standard Oil Co. v. *Southern Pacific Co.*, 268 U.S. 146, 156:

"And by numerous decisions of this court, it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value."

The total cost of the land, buildings, and equipment was approximately $235,000. This was divided as follows (R. 562-563):

Land	$23,000
Building	37,000
Parchmentizing machine	78,800
Installation	20,000
Other machinery and equipment	75,000
	$233,800

There was evidence tending to show the costs of operation of the plant, and, therefore, by reference to the fair market price of its products under normal conditions with the combination out of the way, the reasonable probability of making profits under those conditions. The probable earning capacity of the plant is one of the factors for the basis of a judgment as to value.

Minnesota Rate Cases, 230 U.S. 352, 434.

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. The

scope of the inquiry was thus broadly described in *Smyth* v. *Ames* [169 U.S. pp. 546, 547]: 'In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, *the probable earning capacity of the property under particular rates* prescribed by statute, and *the sum required to meet operating expenses*, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.' "

While this was said in a case in which the question was the fair value of certain property for rate purposes, of course the method described is applicable to any other case where it is sought to determine the value of property not having any readily ascertainable market value.

The jury were therefore clearly entitled to consider the evidence of the earning capacity of the plant in determining its value under normal conditions, and of the diminution in its earning capacity in determining how much the value had been depreciated.

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 328:

"The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner . . . The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to the owner."

In March, 1928, Story's cost of production, including conversion, finishing, selling, and administrative expense, was 14.2 cents per pound (R. 564).

The costs for that month in dollars were:

Conversion costs	
Waterleaf	$24,373.63
Acid	2,358.44
Bleach	91.04
Direct Labor	1,313.63
Supervision	350.00
Power	1,034.45
Water	180.00
Machinery Repair Parts	47.09
Repairs and Maintenance	260.41
General works	643.41
Total	$30,652.10
Finishing Costs	
Materials	$1,040.86
Direct labor	1,685.09
Supervision	245.00
Box shop expense	115.08
Power	297.83
Repairs & maintenance	231.21
General works	211.59
	$3,808.66
Selling Expense	$2,630.85
Administrative Expense	$1,220.79

(R. 584-585.)

In March the mill was running at about one-half production (R. 559). At capacity, that is, if production had been doubled, the costs of production per pound of parchment would have been reduced. The overhead expense, of course, would not have been doubled. "In labor there would be a tremendous saving in percentage as production increased.

There would be a slight saving in acid and chemicals as you increase production. It would be a fair amount, about ten per cent, if the production was doubled. Water would show a saving likewise . . . about ten per cent . . . doubling production might increase the amount of repairs and maintenance, but there would be a saving in percentage, that is, that would not be doubled'' (R. 584).

The plaintiff's parchmentizing machine was larger and more efficient than those of the defendants and West Carrollton. ''There was no machine of this size at Kalamazoo. They [the plaintiff] had the machine up to a speed of 360 feet; the product turned out at high speed was excellent. The machine was 120 inches wide that made paper 110 inches wide. The highest speed of any machine which he [the witness, Ezra Levin] had seen before this machine was 125 feet per minute. The widest roll that he had seen before on any machine was 92 inches, that is, it would produce paper 92 inches wide. This machine made it possible to run paper with the same number of men in a larger quantity. Secondly, the effect was a uniformity in the product. That reduced the cost of production'' (R. 591-592).

There was a reasonable probability that the plaintiff could sell its product at fair prices. The product was excellent, and those who bought it thought so (K-71, R. 276, 278).

It is obvious that, if parchment could be produced at an average cost of 14.2 cents per pound or less and sold at basic prices of 16 and 16½ cents, the prices prevailing in November, 1927, profits could be made, even though a selling commission or discount of 5 per cent were given to jobbers. If 1927 prices were fair and reasonable market prices for parchment, there was therefore a reasonable probability that the plaintiff would make profits within a reasonable time when the plant was first assembled and put into operation.

A reduction of two cents in the basic prices of parchment would, of course, reduce its earnings; that reduction, at half

production, 250,000 pounds a month, would amount to $5000 for the same period; at capacity, to twice that amount.

Goldmann, the treasurer and general manager of the plaintiff company, estimated the value of the plant in June, 1928, having in mind the conditions shown by the evidence, as $75,000 (R. 564).

This estimate, together with all the other evidence of the plaintiff's history, of its preparations for competition, of the operation of its plant, and its attempts to sell its product, and of the acts of the defendants, form a basis for the judgment which the jury were called upon to make.

If there must be difficulty in such a judgment, yet mere difficulty in ascertaining the amount of damages will not, as we have already pointed out, bar a recovery. If there is difficulty, it is not greater than exists in many other cases.

William H. Rankin v. *Associated Bill Posters*, 42 Fed. (2d) 152, 155 (C.C.A. 2):

> "The fact that this amount of the plaintiff's damages could not be expressed in exact figures did not make them speculative. There was no speculation as to the fact of actual damage. Its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damages it has suffered. This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted."

Pennsylvania Sugar Refining Co. v. *American Sugar Co.*, 166 Fed. 254, 260 (C.C.A. 2):

> "But the defendants further urge that the complaint merely shows a naked intention to engage in interstate commerce, and that legal damages cannot be predicated upon the prevention of the carrying out of any such intention. We cannot so regard the allegations of the

complaint. It is averred that the plaintiff had been engaged in interstate commerce, had temporarily ceased to do business, had built a new refinery at great expense, and was prepared and intended to resume business as before. Something more than a mere mental intention to engage in interstate commerce is involved when a corporation spends millions of dollars in building a sugar refinery which is only of use when operated and which can only be operated by engaging in interstate commerce. *The amount of money lost in the enterprise cannot be regarded as wholly speculative and problematical.*" (Italics ours.)

Barrett Co. v. *Panther Rubber Mfg. Co.*, 24 Fed. (2d) 329, 337 (C.C.A. 1):

"It becomes evident that there was a substantial degree of good will. It appears that, as the result of defendant's action, the plaintiff put out to the trade about three-quarters of a million dollars worth of heels which proved unmerchantable. These heels were largely scattered in the trade, to the lasting detriment of the reputation of plaintiff's product. It is not necessary that damages of this kind, in order to be recoverable, shall be capable of calculation with mathematical accuracy; these elements may be determined by approximation."

Hyer v. *Richmond Traction Co.*, 168 U.S. 471, 483:

"The enterprise, he says, is a new one; it is difficult to put a fair pecuniary value on the stock or on the franchise. It is one of those things contingent largely on the successful working of the railway. It must be conceded that there is force in the contention that only by letting the plaintiff into the possession of the inter-

> est he claims can adequate compensation be secured. At the same time the present value of the franchise and therefore of the stock of the corporation owning the franchise is not wholly beyond estimate. That which it may have three or four years hence may depend largely upon the matter of management. But it is a franchise which has definite possibilities. The miles of track covered by it, the population adjacent to the line, and, therefore, the number of people likely to avail themselves of its advantages, the cost of construction and of operation, are all well-known facts, and upon such known facts it is not impossible for a jury to form a fair estimate of the value of the franchise, and, therefore, of the damage which the plaintiff has sustained by the repudiation of the contract to give him a half interest in it."

Point IV. The plaintiff was at least entitled to recover nominal damages and its costs.

It may be granted that the gist of an action at law under the Anti-Trust laws is damage, and that a plaintiff may not have a verdict unless he shows damage. In other words, an individual may not maintain an action for a public injury; in order to establish a private injury he must prove that the conduct forbidden by the statute has damaged him.

Even the opinion of the majority of the Court below, however, recognized that the evidence showed some damage to the plaintiff. It must be clear indeed, on any view of the case, that the carrying on of a price war against the plaintiff was bound to result in some damage to it.

The ground of the Court's decision below is that there was—

> "A lack of proof that by reason of the alleged unlawful acts of the defendants it has suffered damages through what is termed 'loss of profits', which can be

> measured and expressed in figures that are not based on speculation and conjecture . . ."

Surely, if unlawful acts of the defendants caused some damage to the plaintiff, though in an amount not ascertained, it must be held that the plaintiff was thereby injured.

And it is certainly the general rule, where it appears that the plaintiff has been injured and actual damage has been sustained, but the evidence fails to show with sufficient certainty its amount, that the plaintiff is yet entitled to recover nominal damages.

> *United States* v. *Mock*, 149 U.S. 273.
> 17 Corpus Juris, 725, and cases cited.

It is submitted that the rule is applicable to an action at law under the Anti-Trust laws. Where one has been injured, he should have judgment even if, by reason of the nature of the injury, he is unable to prove and recover substantial damages.

It may be attempted to support the contrary view by citing *Keogh* v. *Chicago & N.W. R. Co.*, 260 U.S. 156. One sentence in the opinion in that case is as follows:

> "Under §7 of the Anti-Trust Act . . . recovery cannot be had unless it is shown that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted."

We are not ready to believe, however, that that sentence was intended as a decision that nominal damages could not be recovered in an action under the Anti-Trust laws where some damage was shown, but its amount was left uncertain. The question was not then before the Court. The balance of the opinion shows clearly that what the Court decided was that there was no evidence of damage to the plaintiff, nor that its amount was indefinite; it concludes:

"Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates, or that any other advantage would have accrued to him."

It should be noted that a judgment for nominal damages may be of special importance to a plaintiff in an action under the Anti-Trust laws, since it would carry costs, which include a reasonable attorney's fee.

Point V. The Circuit Court of Appeals had no power to order judgment for the defendants below.

Of course the Court below had no power to order a judgment for the defendants unless by reason of the fact that the jury rendered an alternative verdict and consented that, if as a matter of law the plaintiff was not entitled to a verdict, a verdict might be entered for the defendants (R. 13, 605).

Slocum v. *New York Life Insurance Co.*, 228 U.S. 364.

Whether a jury may be required to return an alternative verdict, in the form in which it was done in this case, in view of the Seventh Amendment, has never been passed upon by this Court, although in *Northern Railway Co.* v. *Page*, 274 U.S. 65, the practice was assumed without discussion to be valid.

The practice has been adopted in the District of Massachusetts, under the Conformity Act, from the practice in the state Courts of Massachusetts under a state statute (Massachusetts General Laws, c. 231, sec. 120).

Automatic Pencil Sharpener Co. v. *Boston Pencil Pointer Co.*, 279 Fed. 40.

The practice was unknown at common law at the time of the adoption of the Federal Constitution. In the exhaustive

review of the modes and forms of trial by jury in *Slocum* v. *New York Life Insurance Co., supra,* no reference was made to any such practice. As that case decided that the Seventh Amendment safeguarded the right to trial by jury as it existed at the time of the Constitution and that final judgment could not be ordered on reversal by the reviewing Court under a state statute where it was decided that there was no evidence for a jury, the practice seems clearly to conflict with the constitutional guaranty.

In any event, the Circuit Court of Appeals had power under the terms of the verdict only to order that the verdict now be entered for the defendants. It did not have power to order judgment and thereby deprive the plaintiff of the right to move for a new trial or to prosecute its exceptions, and, if it should obtain a new trial, to supply other evidence of its damages.

Conclusion.

In a comment on the decision of the Circuit Court of Appeals in 39 Yale Law Journal it is said, at page 1040:

> "The effect of such a holding is to make the damage clause of the Anti-Trust Acts available as a remedy only to well established concerns, and not to new-comers in a particular field. Yet the act was designed to protect the one as well as the other."

The criticism made is obviously justified.

The District Court denied a recovery for loss of profits which would have been made on the ground that there can be as matter of law no reasonable certainty of profits in a new business, and restricted recovery to the effect of the conspiracy upon the plaintiff's property, that is, its product and its plant.

The Circuit Court of Appeals denied even this limited recovery on the ground that the conspiracy had no measur-

able effect upon the value of plaintiff's property, since it was a "moral certainty" that the established firms in the absence of a conspiracy would have done to a newcomer what was in fact done.

It is the law, if these decisions are correct, not only that there can be no reasonable certainty that a new business will make profits, but that it is a reasonable certainty that such an enterprise will fail.

Fortunately this doctrine of despair, if it be law, is not yet received as a practical guide in the world of affairs. It was not accepted by the jury nor by any of the persons involved in this litigation. The plaintiff's stockholders would not have invested their money in the enterprise had not their study of the situation convinced them that it had some value. The conspirators would have seen no occasion for concerted action against the plaintiff if they had believed that its business could not succeed in normal competition.

We submit with confidence that it is not a doctrine of this Court.

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